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*Brief of Ellinwood, Britton & Brown*  
*Supreme Court of the United States.*

OCTOBER TERM, 1897.

*Filed Dec. 13, 1897.*

THE NORTHWESTERN NATIONAL  
BANK, THE RIORDAN MERCANTILE  
COMPANY, AND THE ARIZONA  
LUMBER & TIMBER COMPANY,

APPELLANTS,

v.

B. N. FREEMAN, F. L. KIMBALL, AND  
J. H. HOSKINS, CO-PARTNERS, AS  
THE ARIZONA CENTRAL BANK,  
AND JOHN VORIES,

APPELLEES.

No. 209.

Appeal from the Supreme Court of the Territory  
of Arizona.

**BRIEF ON BEHALF OF APPELLANTS.**

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A. T. BRITTON,  
A. B. BROWNE,  
*Of Counsel.*

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THE NORTH  
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AMERICAN  
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## APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

*Brief on Behalf of Appellants.*

### STATEMENT.

The following is the statement of facts in the above-en-  
titled cause, as found by the Territorial Supreme Court  
(Rec., pp. 103, 107):

“On July 10, 1890, Harry Fulton, one of the defendants in the Court below, executed an alleged chattel mortgage for \$7,500, payable in one year, in favor of Arizona Central Bank, one of the appellees herein and plaintiffs in the Court below; that the description in said mortgage of the property purporting to be covered by it is as follows: ‘1,200 lambs, marked—ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear; 1,600 ewes marked hole in left ear and split in right ear; 2,200 wethers marked hole in right ear and split in left ear, making 5,000 sheep in all with the Fulton brand.’

“That on said day said Fulton executed another alleged mortgage for \$4,000, payable in ninety days, in favor of John Vories, one of the appellees herein and one of the defendants in the Court below; that the description in said alleged mortgage is as follows: ‘Wethers and dry ewes to the number of 1,000, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right.’

(It will be noted that *neither* of these mortgages covered the *increase* of the animals nor the annual wool clip.)

“That on said day said Fulton owned and possessed 6,200 sheep that were herded and run together, and this was all he owned, said sheep being marked as follows: ‘Ewes and ewe lambs split in the right ear, hole in the left; wethers and wether lambs reverse;’ and both of the said appellees had knowledge of this fact at the time they accepted their alleged mortgages, the one on 5,000 head and the other on 1,000 head, 200 head not being included in either of said mortgages, all of said sheep having the same mark and running in the same herd, and none of them being capable of identification save only by the ear mark put on them as aforesaid, and that therefore there was no way by which any of said sheep could be distinguished from any of the others.

“That said Fulton continued in the ownership and possession of all of said sheep, save only such as died, were sold by him, consumed or lost, until the 18th December,

“ 1893. At no time did appellees, or either of them, ever  
 “ take or ever have possession of said sheep, or any of them,  
 “ or of the increase thereof, nor were any of said sheep or  
 “ the increase thereof ever by any one identified, designated,  
 “ in any way segregated, apportioned, or substituted to the  
 “ or on account of the said pretended mortgages, or of either  
 “ thereof. From date of said mortgages (July 10, 1890) to  
 “ January 4, 1893, said Fulton from time to time sold of  
 “ said sheep as follows: 1,700 head, at \$3 per head, that  
 “ were by said Fulton accounted for, and the proceeds of  
 “ which he deposited with the appellee Arizona Central  
 “ Bank; that both of said appellees knew of these sales and  
 “ consented to them.

“ On January 4, 1893, said Fulton executed a mortgage for  
 “ \$8,885 in favor of Arizona Lumber & Timber Com-  
 “ pany, one of appellants herein and one of the defendants  
 “ in the Court below, covering, among other property, the  
 “ following-described sheep: ‘About 3,000 ewes, 1,000  
 “ ‘wethers, and 2,000 lambs, same being all the sheep now  
 “ ‘owned by mortgagor, and including all wool and increase  
 “ ‘which may be produced by said sheep marked—ewes, split  
 “ ‘in right ear, hole in left; wethers reverse.’ At the in-  
 “ stance of appellees said appellant, Arizona Lumber &  
 “ Timber Co., permitted the following recital to be in-  
 “ serted in said last-mentioned mortgage, namely: ‘This  
 “ ‘being subject to a mortgage on 5,000 of above sheep to  
 “ ‘Arizona Central Bank, and one on 1,000 head, and the resi-  
 “ ‘dence property to John Vories, said number, as described  
 “ ‘in mortgages, to be kept good out of increase.’ There  
 “ was consideration for the foregoing recital in the mort-  
 “ gage of January 4, 1893, namely, that the appellees  
 “ should forbear to foreclose their mortgages, and should  
 “ release their claim on the wool clip of 1893, the wool at  
 “ that time not having been shorn.

“ That to August 30, 1893, \$3,000 of the amount claimed  
 “ to be due on the mortgage of January 4, 1893, was paid  
 “ out of wool proceeds, and that on said day said Fulton,  
 “ for the purpose of securing a \$500 advance, and applying  
 “ the remainder as a payment on said mortgage of January  
 “ 4, 1893, executed his promissory negotiable note, payable

“ in 90 days, securing the same by a chattel mortgage for  
 “ the sum of \$6,000 to the Arizona Lumber & Timber Co.

“ That said mortgage was a conveyance, as a security for  
 “ the payment of said note, of sheep, the same being in said  
 “ mortgage described as follows, namely: ‘About 3,200  
 “ ‘ewes, more or less; about 1,300 wethers, more or less;  
 “ ‘about 1,400 lambs, more or less, being all the sheep now  
 “ ‘owned by mortgagor, including all the wool and increase  
 “ ‘which may be produced by said sheep—marked, ewes and  
 “ ‘ewe lambs, split in right ear, hole in left; wethers and  
 “ ‘wether lambs, reverse.’

“ That in said last-mentioned mortgage no recital or ref-  
 “ erence was made in any way, nor in any manner, to the  
 “ existence of any other mortgage or mortgages whatso-  
 “ ever.

“ That on the 29th day of September, 1893, and prior to  
 “ the maturity of said last-mentioned note of \$6,000, said  
 “ appellant Arizona Lumber & Timber Co., representing  
 “ that said mortgage was a first and prior lien on said de-  
 “ scribed sheep, and by means thereof, sold, assigned, in-  
 “ dorsed, and delivered said note and mortgage to the  
 “ Northwestern National Bank, one of the appellants herein  
 “ and one of the defendants in the Court below, said North-  
 “ western National Bank becoming an innocent purchaser  
 “ for value.

“ That on December 18, 1893, said Fulton being then  
 “ indebted to Riordan Mercantile Company, one of the ap-  
 “ pellants herein and a defendant in the Court below, in  
 “ the sum of \$810.91, it brought its action in said District  
 “ Court against said Fulton whereby to collect the same,  
 “ and at the same time caused to be issued out of the clerk’s  
 “ office of said Court a writ of attachment, which was then  
 “ levied on the property following, namely: ‘all the right,  
 “ ‘title, and interest of the defendant Harry Fulton in and  
 “ ‘to the following-described sheep: 2,926 ewes, marked  
 “ ‘hole in left ear, split in right; 900 wether sheep, marked  
 “ ‘hole in right ear, split in left ear; 1,287 lambs—ewe  
 “ ‘lambs marked hole in left ear, split in right; wether  
 “ ‘lambs marked hole in right ear, split in left; 118 rams,’  
 “ same being all of the sheep then owned by the said  
 “ Fulton.

“That on 16th March, 1894, judgment was rendered in  
 “said suit in favor of said plaintiff company and against  
 “said Fulton, for said amount, and said attachment lien  
 “was foreclosed; that on the 31st day of March, 1894, the  
 “Sheriff of said county of Coconino, by virtue of and  
 “pursuant to said judgment, sold said property and de-  
 “livered the same to the appellant Riordan Mercantile  
 “Company, who then entered into the possession thereof,  
 “was so in the possession thereof when this cause was  
 “tried in the lower Court, and are still in the possession  
 “thereof

“That by virtue of said writ of attachment the Sheriff  
 “attached all the sheep then owned by said Fulton, and  
 “that on said day, to wit, on the 18th day of December,  
 “1893, there were of said sheep only 1,000 head of ewes  
 “remaining out of all the sheep that existed on July 10,  
 “1890, the date of said alleged mortgages to appellees;  
 “that the remainder of said ewes, all the male sheep and  
 “the lambs, had by that time died, been consumed, sold or  
 “lost.

“That subsequent to the making of said alleged mort-  
 “gages to said appellees, an oral agreement between them  
 “and the said Fulton was made that the securities of ap-  
 “pellees were to be kept good out of the increase by sub-  
 “stitution, the consideration therefor being that said Fulton  
 “might sell and dispose of the said sheep without interfer-  
 “ence from appellees.

“That Sisson, a witness for appellants in this case, is and  
 “was during all of said transactions the treasurer of both the  
 “Riordan Mercantile Co. and the Arizona Lumber & Tim-  
 “ber Co., appellants herein, and that these two corporations  
 “have practically the same officers.

“That in said District Court said Arizona Central Bank  
 “brought its suit as plaintiff against said Fulton, Vories,  
 “Donahue as Sheriff, the Arizona Lumber & Timber  
 “Company, the Riordan Mercantile Company and the  
 “Northwestern National Bank, as defendants, asking for a  
 “foreclosure of its said alleged mortgage, the same being  
 “the above-entitled cause.

“That said action was tried and judgment was rendered

" foreclosing said alleged mortgages of both of appellees  
 " herein and also the said mortgage dated January 4, 1893,  
 " of said Arizona Lumber & Timber Company and the  
 " mortgage owned by said Northwestern National Bank as  
 " aforesaid, in which said judgment said Court adjudged  
 " that appellees have a prior and first lien on said property,  
 " viz., the Arizona Central Bank upon 5,000 sheep of the Ful-  
 " ton mark by reason of its said mortgage, and the said Vories  
 " on 1,000 sheep of the Fulton mark by reason of his said  
 " mortgage; and said Court decreed and ordered that an  
 " order of sale issue for the sale of all of said property to  
 " the Sheriff of said county, and that the proceeds arising  
 " therefrom be divided by the Sheriff and applied as fol-  
 " lows, namely, at the ratio of five dollars to said Arizona  
 " Central Bank and one dollar to said Vories; that in case  
 " anything should be left after the payment of said two  
 " mortgages to said bank and Vories, the same should be  
 " applied to the payment of the judgments of said North-  
 " western National Bank and said Arizona Lumber & Tim-  
 " ber Company and Riordan Mercantile Company in the  
 " order named."

### SPECIFICATION OF ERRORS.

The appellants have made seventeen assignments of error (Rec. 107-113), which are grouped in the discussion of this case under seven heads as follows:

FIRST. In the first assignment of error it is set forth that the trial Court erred in adjudging, and the Territorial Supreme Court erred in affirming said judgment, that the mortgages of the appellees were prior liens on *all* of the sheep owned by defendant Fulton at the time of the execution of said mortgages, even though said mortgages had been good and prior liens on the sheep specified therein.

SECOND. In the second, third, fifth, and eighth assignment of error, it is set forth that the trial Court, and the Territorial Supreme Court in sustaining its holding, erred

in admitting in evidence the mortgages from defendant Fulton to the appellees, marked Exhibit "A" and "B," against the objections of the appellants; and in overruling motion of appellants to strike out of the evidence the said mortgages; and in holding that said mortgages were valid and subsisting liens on all of said property; and in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description.

**THIRD.** In the fourth and seventh assignments it is set forth that the Court erred in admitting, over the objection of the appellants, testimony concerning a conversation between J. H. Hoskins, John Vories, F. W. Sisson, and Harry Fulton, and evidence relative to an alleged agreement, and evidence tending to prove a breach of contract between the appellees and appellant Arizona Lumber and Timber Company.

**FOURTH.** The trial Court erred, as set forth in the fifteenth and sixteenth assignments, in adjudging that on the date of its decree herein the mortgage of said appellee bank covered five thousand head of sheep of the Fulton herd and mark, such adjudication attempting to substitute five thousand head of sheep after the making of said two mortgages to appellees; the trial Court erred in attempting said substitution and then holding it good as to appellants Riordan Mercantile Company and Northwestern National Bank.

**FIFTH.** The trial Court erred, as set forth in the eleventh assignment, in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton, notwithstanding said mortgages, and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central Bank and said Vories, in the proportion of five dollars to the former to one to the latter.

**SIXTH.** The trial Court erred, as set forth in the seven-

teenth assignment, in adjudging that appellant Northwestern National Bank was bound by said pretended agreement of substitution or was bound by said pretended mortgages of appellees, or that said mortgages were prior liens on said property, or on any of it to the mortgage owned by said appellant.

SEVENTH. In the sixth, ninth, tenth, twelfth, thirteenth, and fourteenth assignments it is set forth that the Court erred in denying and overruling defendant's motion for a new trial of said cause; and in deciding that the mortgage to said appellee the Arizona Central Bank conveyed five thousand head of sheep, marked—ewes with hole in left ear and split in right, wethers with hole in right ear and split in left ear, and that a thousand more of said sheep were conveyed by mortgage to said appellee Vories, with the same marks; and in adjudging that the property included in the said attachment lien of the said Riordan Mercantile Company, and sold and delivered to said Company thereunder, was the same property that is conveyed, or attempted to be conveyed, by the mortgages of said appellees; and in adjudging that the rights, title, and interests, obtained by said Riordan Mercantile Company, by virtue of said attachment lien and sale, was subject to the alleged rights of said appellees, by virtue of their said pretended mortgages; and in adjudging that appellants Riordan Mercantile Company and Arizona Lumber and Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees; and in adjudging that F. W. Sisson, as the Treasurer of said Riordan Mercantile Company, agreed with said appellees that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep, and that the wool was released by said agreement to said Company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of said appellees.

## ARGUMENT.

## POINT I.

The decree of the trial Court is that the mortgage owned by Northwestern National Bank is a valid lien against the sheep in controversy. (Rec., p. 106.) The question involved is one of priority.

The evidence shows that defendant Fulton was the owner of sixty-two hundred head of sheep at the time mortgages to appellees were executed, and that said mortgages only attempted to cover six thousand head, leaving two hundred head unencumbered. (Rec., p. 104.)

Also that the mortgage owned by appellant Northwestern National Bank specifically covered *all* the sheep in the Fulton band, including all increase from same. (Rec., p. 105.)

From these facts there is no way of avoiding the conclusion that the mortgage owned by appellant Northwestern National Bank is a prior and subsisting lien on at least a part of the sheep in controversy.

## POINT II.

The trial Court erred for the reason that said pretended mortgages on their faces, as against appellant Northwestern National Bank, are null and void. Also for the reason that said pretended mortgages were and are void, as the description of the property therein attempted to be conveyed, as a security, is insufficient, vague, and so uncertain as to be no identification thereof, and for the further reason that said mortgages do not attempt to convey *all* of the sheep of defendant Fulton, but only a certain number out of a greater

number, and there is nothing in the mortgages whereby those attempted to be mortgaged could be distinguished from those that were not attempted to be and were not mortgaged.

The mortgage owned by appellant Northwestern National Bank and the attachment levy of appellant Riordan Mercantile Company specifically covered all the sheep in the Fulton band, and all increase of same. (Rec., p. 105.)

The description of property attempted to be covered by the alleged mortgage made by defendant Fulton July 10, 1890, in favor of appellee Arizona Central Bank is as follows:

“Twelve hundred lambs marked—ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear; sixteen hundred ewes marked with hole in left ear and split in right ear; twenty-two hundred wethers marked with hole in right ear and split in left ear; making five thousand sheep in all with the Fulton brand.” (Rec., p. 104.)

The description of the property attempted to be covered by the alleged mortgage made by defendant Fulton, July 10, 1890, in favor of appellee John Vorhies is as follows:

“Wethers and dry ewes, to the number of 1,000; wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right.” (Rec., p. 104.)

At the time the said mortgages to appellees were executed, defendant Fulton was the owner and possessor of sixty-two hundred sheep of various ages and sex, all in the same mark and herd (that is, all ewes were marked alike, and all wethers were marked alike), and both appellees had knowledge of these facts at that time, and yet accepted their alleged mortgages, the one on 5,000 head and the

other on 1,000 head, 200 not being included by either, and no way being suggested for distinguishing any particular sheep. (Rec., p. 104.)

Defendant Fulton continued his possession and control over all said sheep, excepting those that died or were sold, consumed, or lost, until December 18, 1893, the date of the attachment by appellants Riordan Mercantile Company. (Rec., p. 104.)

At no time did the appellees, or either of them, ever take or have possession of all or any of said sheep; nor were said sheep, or any of them, at the time of the execution of the alleged mortgages, or at any other time, by the appellees, or by defendant Fulton, or by any one else, identified, set aside, distributed, separated, designated, or apportioned, or substituted to the pretended mortgages of the appellees, or to either thereof; or were said sheep which were attempted to be mortgaged ever in any way separated from those which were not attempted to be and were not mortgaged. (Rec., p. 104.)

"A chattel mortgage must contain terms of description that will serve to distinguish the property embraced therein from all other property of the same kind, because the claim of the mortgage is to be enforced on the identical property mentioned in the mortgage; and if the description in that instrument be so vague and uncertain as necessarily to apply equally to all property of that kind, then there can be no identification of it."

*Pingrey on Chattel Mortgages*, Sec. 142.

"When the precise number only is conveyed and there is in fact a greater number, and no intention is manifest to include the whole, there would be a failure of identification of particular things conveyed, and the mortgage must be void for want of proper description."

*Pingrey on Chattel Mortgages*, Secs. 149 & 150.

*Cobbey on Chattel Mortgages*, Secs. 181 & 182.

*Jones on Chattel Mortgages*, Sec. 56.

*Herman on Chattel Mortgages*, Sec. 42.

"Where there is a larger number of the same kind in the possession of the mortgagor and no particular description otherwise than that applicable to all of that class, nor any selection nor delivery nor any specification as to which are intended out of a larger lot on hand, such mortgage will be ineffectual to pass any title to any particular property or any interest in the property on hand."

*Stonebreaker v. Ford*, 81 Mo. 538.

*Fowler v. Hunt*, 48 Wis. 345.

*Richardson v. Alpena Lumber Co.*, 40 Mich. 203.

*Blakely v. Patrick*, 67 N. C. 40, 12 Amer. Rep. 600.

*Kelly v. Reed*, 57 Miss. 89.

*Avery v. Popper*, 34 S. W. 325.

*Parsons Savings Bank v. Sargent*, 20 Kan. 576.

*Clark v. Vorhees*, 36 Kan. 144, 12 Pac. 529.

*Price v. McComas*, 21 Neb. 195; 31 N. W. 511.

*Rood v. Welch*, 28 Conn. 157.

"The property described must be identified at the time of the execution of the mortgage."

*Cobbey on Chattel Mortgages*, Sec. 159 and cases there cited.

"The mortgage and transfer of property are not completed so as to pass the property so long as anything remains to be done to identify it."

*Pingrey on Chattel Mortgages*, Sec. 142.

*Jones on Chattel Mortgages*, Sec. 55.

*Herman on Chattel Mortgages*, Sec. 38.

*Fowler v. Hunt*, 4 N. W. 481.

*Newall v. Warner*, 44 Barb. 258.

*Lee v. Cole*, 21 Pac. 819.

*Payne v. Wilson*, 74 N. Y. 348.

In this action in the trial Court the Arizona Central Bank was plaintiff and John Vories one of the defendants, and there was no community of interest between them. Said appellee bank therefore attempted to take a mortgage on 5,000 head of sheep out of 6,200 running together, of the

same kind and marks, without identifying them; and appellee Vories attempted a similar step on 1,000 head out of 6,200; 200 being excluded from both mortgages; there being no pretense of an attempt to mortgage *all* the sheep. (Rec., p. 104.) Under the foregoing decisions, we submit to the Court that said mortgages were and are void and that the lower Court should have so held.

### POINT III.

The appellees claim they are entitled to foreclosure of their alleged mortgages on the number of sheep described in said mortgages, by virtue of an alleged agreement with the appellant the Arizona Lumber and Timber Company, same being a recital inserted in the mortgage given to said appellant, January 4, 1893, by defendant Fulton; which recital is as follows:

"This being subject to a mortgage on 5,000 of above "sheep to Arizona Central Bank, and one on 1,000 head "and the residence property to John Vories; said number "as described in mortgages to be kept good out of the increase." (Rec., p. 105.)

The Court sustained the above claim of appellees and admitted in evidence testimony concerning a conversation between Hoskins, Sisson, Vories, and Fulton; and evidence relative to this alleged agreement between appellees and appellant the Arizona Lumber and Timber Company; and evidence tending to prove a breach of contract between said parties.

The Court erred in this because said evidence can have but one effect, and that is to change the description of the property in the mortgages themselves, to include therein property not included in the mortgage itself; and to supply a deficit in one kind of property with other property not originally mortgaged; that it thereby changes and varies

the terms of the mortgages, and that in fraud and deprivation of the rights of appellants in the premises; that said conversation is "hearsay" as to appellant Northwestern National Bank, and the agreement claimed to have been made thereby is an independent contract, if it be a contract, from the mortgages, the breach of which could not be tried in this action; and cannot in any way affect said appellants Riordan Mercantile Company and Northwestern National Bank, or either of them; said appellant Northwestern National Bank having no notice or knowledge thereof. Also for the reason that said alleged contract was no part of said alleged mortgages of said appellees sought to be foreclosed in this action; nor was it a part of the chain of title in and to said property; nor were the appellants Riordan Mercantile Company and the Northwestern National Bank, or either of them, in any way parties to said alleged contract; nor was there any consideration to either of them in said alleged agreement, nor was defendant Fulton a party thereto; nor did he receive any consideration therein; nor could it in any event bind said appellants Riordan Mercantile Company and Northwestern National Bank.

Description in a mortgage is conclusive as to scope; one kind of property will not be taken to supply a deficit in another, and parol agreement will not enlarge scope of mortgage.

"There can be no agreement by the parties that will bind others that there shall be a substitution of other property for that first specified."

*Cobbey on Chattel Mortgages*, Secs. 158 and 173.

*Pingrey on Chattel Mortgages*, Sec. 148.

*Jones on Chattel Mortgages*, Sec. 62.

*Hutt v. Arnett*, 51 Ill. 198.

*Elliot v. Long*, 77 Tex. 467.

*Citizens' Bank v. Rhutasel*, 25 N. W. 261.

"The lien of a chattel mortgage is not affected by a prior  
 "parol agreement between the mortgagor and third persons  
 "that other mortgages to be executed by the mortgagor  
 "shall have priority over it, where it is actually executed  
 "and delivered in violation of such an agreement and with  
 "the intent to give it priority; and it is immaterial whether  
 "or not the mortgagee had notice of the prior parol agree-  
 "ment."

*Lazarus v. The Henrietta National Bank*, 10 S. W. 252.

The rule would be, and is, just as stringent in subsequent as in prior contracts. A very strong case in point is that of "*In re Allen's estate*," 26 Atl. 591. In that case it appears that A gave claimant a mortgage on certain furniture and lumber. The mortgage provided that the lumber might be sold in course of business, but the stock should be kept up by purchase. A afterwards gave another mortgage on his entire stock of lumber to C, subject to claimant's mortgage. And it was assumed by claimant and C that claimant must be paid before C could realize. A became insolvent and C took possession of the property under his mortgage for division of the property among the creditors according to their respective rights, C at the time notifying claimant that he recognized his right. The Court held that claimant could only recover the value of the property then on hand which was in existence at the time of the execution of his mortgage. It was found that only a small pile of lumber, worth thirty-four dollars and forty cents, was then in existence which had been included in the original mortgage, and claimant recovered only that amount.

The evidence shows that the recital above set forth was the agreement of the appellant Arizona Lumber and Timber Company, and was a simple estoppel against *said appellant* under the *particular instrument* in which it occurred, the mortgage of January 4, 1893, and had no existence aside from that instrument; a breach of which

could be made *only by said appellant*, under that *particular instrument*, by attempting a foreclosure of same without reference to appellees.

August 30, 1893, said defendant Fulton being unable to further continue the running of his sheep without assistance, made a new mortgage to the appellant the Arizona Lumber and Timber Company, covering the following sheep:

"About 3,200 ewes, more or less; about 1,300 wethers, " more or less; about 1,400 lambs, more or less; being all " the sheep now owned by mortgagor, including all the " wool and increase which may be produced by said sheep, " marked—ewes and ewe lambs, split in right ear, hole in " left; wethers and wether lambs reverse." (R., p. 105.)

In this mortgage there was no recital or reference in any manner whatsoever to any other mortgage. A large part of the amount of same was credited on the mortgage of January 4, 1893, and a part was for further advances to defendant Fulton; but the mortgage of January 4, 1893, was left on the records as security for the remainder due on same by virtue of other property included in it (Rec., pp. 104-105); and while no release of the sheep included therein was made of record, the evidence shows that as a matter of fact the claim of the appellant Arizona Lumber and Timber Company was relinquished as to the sheep after the execution of the mortgage of August 30, 1893. (R., p. 105.) At the time appellant Arizona Lumber and Timber Company ceased to claim under the mortgage of January 4, 1893, against the sheep, the recital in said mortgage of January 4, 1893, which was never more than an executory contract, became of no effect against any one. So that when the said mortgage of August 30 was sold to appellant Northwestern National Bank, and when the attachment levy of the appellant Riordan Mercantile Com-

pany was made, the pretended agreement was no longer in effect, and the rights of said appellants could in no way be affected by it. Moreover, if there was a breach in said alleged agreement, it was a breach on the part of appellant Arizona Lumber and Timber Company, for which it would be responsible in a separate action, and has no part in this case.

We contend, however, that there has never been a breach in said agreement, and that no breach could occur except in the event of Arizona Lumber and Timber Company attempting to foreclose the mortgage of January 4, '93, irrespective of said recital. This is a question of simple contract and not a question of notice.

#### POINT IV.

Appellees also lay claim to the number of sheep as described in their said mortgages by virtue of the oral agreement which they claim was made with defendant Fulton subsequent to the execution of said mortgages, and which was as follows :

“That the securities of appellees were to be kept good out of the increase by substitution, the consideration therefor being that said Fulton might sell and dispose of the said sheep without interference from appellees.” (Rec., pp. 106.)

We are at loss to know how such an agreement can be of any assistance to appellees or lend any virtue or validity to their mortgages ; on the contrary, we had supposed that it had been the law from *Twyne* case down to the present time ; that such an understanding between the parties to a mortgage would of itself render the mortgage absolutely void.

*Peiser v. Petticolas*, 50 Tex. 638.

Moreover, the evidence shows that neither of the appellants were parties thereto, and fails to show that either of them had any notice or knowledge thereof, and could not, therefore, be bound thereby. Said mortgages of appellees, even if valid, did not specify increase, and the increase of the sheep attempted to be mortgaged, if there were increase, were therefore not covered thereby.

*Cobbey on Chattel Mortgages*, Secs. 367 and 368.

*Jones on Chattel Mortgages*, Secs. 55 and 150.

*Pingrey on Chattel Mortgages*, Secs. 123 and 216.

*Winter v. Lanshere*, 42 Ia. 471.

*Thorp v. Cowles*, 7 N. W. 677.

*Boggs v. Stankey*, 14 N. W. 392.

*Enright v. Dodge*, 24 At. 768 ; 64 Vt. 502.

*Darling v. Wilson*, 60 N. H. 59, S. C.; 49 Am. Rep. 305.

*Rogers v. Gage*, 59 Mo. App. 107.

Moreover, there is no evidence to show that there were any increase from the sheep attempted to be mortgaged to appellees. The burden is upon the mortgagee to show that there were increase, if any, from the specific animals mortgaged; and in the absence of such proof the presumption is there were none.

*Gammon v. Buel*, 53 N.W. 340.

Further, if there were increase there is no evidence showing that any of them were in the herd at the time of the attachment levy or at the time of the decree herein. The evidence shows that at the time of the attachment levy of Riordan Mercantile Company, there were in said band of sheep, carrying said marks, only one thousand head of sheep remaining which were in existence when the mortgages of the appellees were executed. (Rec., p. 105.) There is no evidence to show and no way of ascertaining how many of

this number remaining were attempted to be mortgaged to each appellee or how many in said number were left unencumbered. Moreover, there is no evidence to show that a single sheep of this number remained in the band on the day of the decree. The appellees now attempt to supply the shortage in numbers of sheep originally described in their respective mortgages by substitution. The oral agreement with Fulton was that the increase of the sheep attempted to be mortgaged should be substituted. The evidence is that this was never done. So the Court does the substituting in its decree, and attempts to include in the substitution every sheep in the Fulton band not attempted to be included in mortgages of appellees, and every sheep that was added to the band from any and all sources, by purchase or otherwise, regardless of age, sex, or character, from July 10, 1890, to August 21, 1894, even rams; and holds this substitution good against these appellants. The proposition seems to us preposterous.

"Substituted property is not held by virtue of the mortgage, but by virtue of the agreement of the parties whereby an equitable lien, cognizable only in a Court of Equity, arises in favor of the mortgagee."

*Jones on Chattel Mortgages*, Sec. 154.

*Pingrey on Chattel Mortgages*, Sec. 130.

*Pomeroy Eq. Jur.*, Sec. 1235.

*Simmons v. Jenkins*, 76 Ill. 479.

"There can be no substitution or exchange of property by the parties to the mortgage that will bind third parties, unless the mortgagee takes actual possession of the substituted articles before the rights of third parties intervene."

*Jones on Chattel Mortgages*, Secs. 154 and 62.

*Pingrey on Chattel Mortgages*, Secs. 129, 130, 148, and 214.

*Cobbey on Chattel Mortgages*, Sec. 158.

*Pomeroy Eq. Jur.*, Sec. 726.  
*Hunt v. Bullock*, 23 Ill. 258.  
*Powers v. Freeman*, 2 Lans. 127.  
*Simmons v. Jenkins*, 76 Ill. 479.  
*Titus v. Maybee*, 25 Ill. 232.  
*Rhines v. Phelps*, 8 Ill. 455.

The evidence in this case is uncontradicted that no possession was ever taken by the appellees, either of the sheep attempted to be mortgaged or of the increase or other sheep attempted to be substituted. (Rec., p. 104.)

Substituted property must be identified same as original property described in mortgage; only a mere executory contract exists, and substitution is not made until identification is complete.

"Where an equitable mortgage is claimed as result of an agreement, there must be at the time such agreement is made such an identification of the property that the equitable mortgagee may see with a reasonable degree of certainty what property it is that is subject to his lien. If the evidence fails to show the particular property in a controversy, to which the alleged agreement refers, so as to identify it, it can not be ascertained to what property the lien attaches, and the claim can not be allowed."

*Pingrey on Chattel Mortgages*, Secs. 143, 142.

*Cobbey on Chattel Mortgages*, Sec. 159.

*Jones on Chattel Mortgages*, Sec. 55.

*Pomeroy Eq. Jur.*, Sec. 1235.

*Lee v. Cole*, 21 Pac. 819.

*Payne v. Wilson*, 74 N. Y. 352.

*Fowler v. Hunt*, 4 N. W. 481.

*Newall v. Warner*, 44 Barb. 258.

The evidence in this case shows conclusively that no identification of property attempted to be substituted was ever made at any time by any one. (Rec., p. 104.)

Description of substituted property must be as certain as

though originally embraced in mortgages ; a certain number out of a larger number not good.

"To be held in equity, the description of the property mortgaged must be certain.

"A valid lien in equity cannot be created upon goods which are not specifically defined by the instrument creating the lien."

*Pingrey on Chattel Mortgages*, page 198.

*Jones on Chattel Mortgages*, Sec. 172a.

*Cobbey on Chattel Mortgages*, Sec. 349.

*Pomeroy Eq. Jur.*, Sec. 1235.

*Fishbank v. Van Dusez*, 22 N. W. 244.

*Hughs v. Menefee*, 29 Mo. App. 192.

*Morrill v. Noyes*, 56 Me. 458.

The description of the property attempted to be substituted was an uncertain number of increase out of a larger number of the same kind, no attempt being made to substitute *all* the increase, with nothing to show how many wethers, ewes or lambs, with no way for distinguishing ; a part to one appellee and a part to the other, to make good an unascertained shortage in numbers of wethers, ewes, and lambs described in their respective mortgages. The attempted substitution must therefore be void for uncertainty of description. Moreover, if the mortgages of appellees are void for defective description, the attempted substitution must likewise be void.

Under Arizona Revised Statutes, Sec. 2364, which provides as follows : " No Chattel Mortgage shall have any legal force or effect, except between the parties, unless the residence of the mortgagor and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage ; and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide* and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage,"

in view of foregoing facts and authorities, it is conclusive that the mere executory contract of substitution evidenced by the oral agreement with Fulton, lacking the statutory requirements of a Chattel Mortgage, was void as to the appellants Riordan Mercantile Company and Northwestern National Bank, and that the pretended substitution is of no avail against them.

#### POINT V.

The trial Court held that the chattel mortgages of the appellees were mere securities for debt, and that the legal title to said sheep remained in defendant Fulton; and decreed that all the Fulton band of sheep, up to 6,000 head, those attempted to be mortgaged to appellee Arizona Central Bank, those attempted to be mortgaged to appellee John Vories, those not mortgaged to either, including ewes, wethers, rams, and lambs, should be sold, regardless of age or sex, at one sale, and the proceeds paid to the appellees in the ratio of five dollars to the Arizona Central Bank and one dollar to John Vories.

The evidence shows that the appellees did not have a joint debt or a joint mortgage; that their mortgages were not on the same property and that there was no community of interest between them. (Rec., p. 104.) Moreover, a chattel mortgage is something more than a mere security; it must cover specific property which must be identified at time of execution and upon which *only* it can be foreclosed.

“The object of a mortgage is to create a lien on certain specific property and not to give a right to any property whatever of the particular kind mentioned in it.

“The claim of the mortgage is to be enforced on the identical property included in the mortgage.”

*Pingrey on Chattel Mortgages*, Secs. 142.

*Kelly v. Reed*, 57 Miss. 89.

*Stonebreaker v. Ford*, 81 Mo. 539.

"A chattel mortgage is not a mere security for a debt and in this is distinguished from a real mortgage; it is a conditional sale of the specific chattels and operates to transfer to the mortgagee the legal title, to be defeated only by the full performance of the conditions. Upon breach of the conditions the mortgagee may take possession of the property and henceforth treat it as his own; he may sell it or give it away, squander or destroy it."

*Cobbe on Chattel Mortgages*, Sec. 4 and citations.

*Jones on Chattel Mortgages*, Sec. 1.

*Pingrey on Chattel Mortgages*, Sec. 1.

*Herman on Chattel Mortgages*, Sec. 1.

*Heyland v. Budger*, 25 Cal. 404.

*Wright v. Ross*, 36 Cal. 414.

*Pomeroy Eq. Jur.*, Sec. 1229.

*Parshall v. Eggert*, 54 N. Y. 18.

*Blake v. Corbett*, 120 N. Y. 327.

*Tompkins v. Butie*, 11 Neb. 147.

The trial Court must have realized, when it came to make the decree, the weak and uncertain description of the property attempted to be mortgaged to appellees. It could not foreclose the mortgages on specific sheep, and could not divide the sheep; in order, then, to avoid this difficulty the Court ordered the whole band sold and pro rates the proceeds. Instead of dividing sheep, it divides money. The Court thus created a new contract for appellees to the damage of the appellants and irrespective of their rights.

We respectfully submit that the Court exceeded its jurisdiction in so doing. The judgment must be certain and specific as to the property to be sold under each mortgage. A "lump" judgment or omnibus judgment will not do. If the mortgages of appellees are valid liens, the appellants have the right to demand that each one be foreclosed on the specific sheep which it describes; and, if this cannot be done and a substitution is made, to demand that said substitution be made in accordance with the terms of the

agreement; that the specific numbers in each kind of sheep—wethers, ewes, and lambs—as stated in said mortgages, be made good by corresponding wethers, ewes, and lambs from the increase, if there be any, of the ewes originally attempted to be mortgaged to appellees, and to demand that all increase not so substituted, and all increase from other sources, and all sheep which are not the increase of said ewes, and all sheep not attempted to be mortgaged to said appellees originally, and all other sheep in the herd, be adjudged to said appellants. The decree and judgment of the trial Court must fall.

#### POINT VI.

There is no evidence in the case that appellant Northwestern National Bank had any actual or constructive notice or knowledge of any of the alleged conversations, transaction, and dealings or equities between appellees Fulton and the Arizona Lumber and Timber Company; but the Court holds that the insertion made in the mortgage of January 4, 1893, was constructive notice to this appellant. This recital in the mortgage was made by and at the instance of appellees, and was an obligation on the part of the Arizona Lumber and Timber Company to appellees, who were third parties. It was not an obligation on the part of Fulton, nor was it an agreement between the Arizona Lumber and Timber Company and Fulton. No consideration passed from or to the defendant Fulton for the same. It was a matter which concerned appellees of the one part and the Arizona Lumber and Timber Company of the other part, and related only to the lien of that particular mortgage, and could have no effect whatsoever aside from the foreclosure of that mortgage of January 4, 1893. (Rec., p. 105.) Appellant Northwestern National Bank was an assignee before maturity—an innocent purchaser

for value—of the negotiable promissory note of August 30, 1893, secured by mortgage (Rec., p. 105), and took it as such, free from all equities which existed between the original parties to the note and mortgage, as seems to be well settled by the courts. How much more right or equities would a third party have than the original parties to the instrument?

*Cobbey on Chattel Mortgages*, Sec. 650.

*Pingrey on Chattel Mortgages*, Sec. 775.

*Jones on Chattel Mortgages*, Sec. 503.

*Wiltsie on Foreclosure*, Sec. 351.

*Savvyer v. Prickett*, 86 U. S. 146.

*Kenicott v. Supervisors*, 83 U. S. 452.

*Carpenter v. Longan*, 83 U. S. 271.

*Munday v. Whittemore*, 15 Neb. 647.

The mortgage in which this recital occurs as to keeping the appellees' mortgages good from increase covered other property besides the sheep mortgaged. (Rec., p. 104.) When the mortgage of August 30, 1893, was executed it appears from the evidence that a large credit was made on the former mortgage of January 4, 1893, and it was in fact relinquished so far as the sheep were concerned. (Rec., p. 105.) It was not satisfied on the record, however, because it covered other property, and the debt was not fully paid. But when Arizona Lumber and Timber Company declared to Northwestern National Bank that the mortgage of August 30 was a first lien on *all* the sheep (Rec., p. 105), Arizona Lumber and Timber Company relinquished its right to all of the sheep under the mortgage of January 4, and now makes no claim to any of said sheep under said mortgage. That mortgage then was dead, so far as the Northwestern National Bank was concerned. Even if it had actual notice of this alleged contract, and afterward learned from Arizona

Lumber and Timber Company that they had relinquished the sheep under that mortgage, then that mortgage would have been of no further vitality so far as the sheep are concerned, and notice under that mortgage, which was in fact by the acts aforesaid released on the sheep, was no notice at all, constructive or otherwise.

The position of appellees that this recital in the mortgage of January 4, 1893, was binding notice to all subsequent mortgagees and assignees of said mortgagees, is untenable for another reason. If it was notice of anything it was only of an executory contract of attempted substitution of other property in their mortgages, which substitution was never made in fact; or, it was notice of an attempted substitution, the terms of which were so indefinite as to be insufficient to impart notice.

*Fowler v. Hunt*, 4 N.W. 481.

*Newall v. Warner*, 44 Barb. 258.

*Pomeroy Eq. Jur.* 1235.

*Pingrey*, Secs. 142 and 143, pp. 118 and 120.

If such substitution had been of a definite and specific character, it would still be unavailing against this appellant as constructive notice, because no possession was ever taken of the substituted property.

*Cobbey*, Sec. 158.

*Pingrey*, Secs. 129 & 130, 148 & 214.

*Jones*, Secs. 62 & 154.

*Pomeroy's Eq. Jur.*, Sec. 726.

*Maier v. Davis*, 15 N.W. 187.

*Simmons v. Jenkins*, 76 Ill. 479.

Actual notice of a mortgage invalid by a defective description would have no legal effect as against this appellant.

*Jones on Chattel Mortgages*, Sec. 309.

*Barr v. Cannon*, 28 N.W. 413.

How much effect, then, could a mere executory contract of substitution with defective description have?

There is still another reason why the mortgage held by appellant Northwestern National Bank was superior to the mortgages of appellees.

The evidence shows that of the original sheep mortgaged to appellees there was not more than one thousand remaining; that none of the wethers originally mortgaged were in existence at the time the suit was commenced. (Rec., p. 105.) Moreover, there is no evidence that there were any increase from the sheep described in mortgages of appellees; in the absence of specific proof of there being increase the presumption is there were none.

*Gammon v. Buel*, 53 N. W. 340.

If there were increase from said sheep attempted to be mortgaged to appellees there is no evidence that any of said increase were in the herd at the time of the execution of the mortgage owned by this appellant, or at the time of the decree. So that even if this Court should hold that the recital in the mortgage of January 4, '93, was constructive notice to this appellant, yet the decree rendered by the trial Court could not stand, because the trial Court held that this appellant's mortgage was subject to appellees' mortgages on all the sheep then existing, without regard to number remaining or to the different kinds. *In re "Allen's Estate," supra.*

Moreover, we contend that there is no question of notice here involved apart from an assignment or foreclosure of the mortgage of January 4, 1893, neither of which conditions exists. The appellees acquired no new rights by virtue of the recital in said mortgage, except as against the mortgagee therein when he should proceed to foreclose same. The terms of their own mortgages were not changed and

could not be changed thereby, and they acquired no better rights against any other mortgage subsequently made, or against any other claim of any nature attaching to said property, or against any parties whomsoever, than were already theirs by virtue of their said mortgages. They are protected so far as the mortgage of January 4, 1893, is concerned, but as against all other mortgages and claims whatsoever by whomsoever made, they must stand or fall by their mortgages as they were originally executed.

#### POINT VII.

The Court erred as set forth in seventh specification for each and all of the reasons hereinbefore assigned, and for the further reason that the judgment and decree of the Court is not supported or sustained by the evidence.

The evidence shows that the mortgage of the Arizona Central Bank, appellee, covered only five thousand head of sheep, and that the mortgage of appellee Vories covered only one thousand head of sheep, whereas at the time said mortgages were made and delivered said Fulton, the mortgagor, owned sixty-two hundred head of sheep, of which said mortgagees had notice at the time of the making and delivery of their mortgages (Rec., p. 104); that after the delivery of said mortgages said Fulton, the mortgagor, had sold and butchered over seventeen hundred head of said sheep, of which said appellees had notice and to which they both consented (Rec., p. 104); that many more of said sheep had strayed away, become lost, and that many others had died, and that at the time of the institution of this action there did not remain of said sheep so mortgaged to exceed one thousand head. (Rec., p. 105.) And yet the Court held that all of the sheep on hand at the time of the decree, up to 6,000 head, irrespective of age, sex, or character, in-

cluding all increase and all sheep in the band regardless of their origin, and all sheep not included and not attempted to be included in said mortgages of appellees, *even all the rams*, should be sold to satisfy said mortgages of appellees, regardless of the rights of these appellants. (Rec., p. 106.)

The evidence fails to show how many sheep of any age, sex, or character there were at the time said mortgages to appellees were delivered, except that there were sixty-two hundred all told; and fails to show anything regarding age, sex, character, or number at the time the decree was rendered; and fails to show that there were any sheep in the band at the time of the decree that were in existence when mortgages of appellees were executed. The Court could not, therefore, decide that the mortgages of appellees conveyed, respectively, five thousand sheep and one thousand sheep in the Fulton marks. The evidence fails to show that there were any increase from said sheep, and if there were increase the evidence fails to show that they were in the band at the time of the decree, and shows that they were not included in said mortgages, and could not be included in the decree foreclosing said mortgages. The evidence clearly shows that more than four thousand head of the sheep in the band when the decree was rendered were not in the band when said mortgages of appellees were executed, and there is no evidence to show that any of these four thousand head are the increase of the sheep attempted to be mortgaged to said appellees. (Rec., p. 105.) These four thousand head were therefore not included in said mortgages, and could not be included in decree foreclosing same. The evidence shows that even had a substitution been made at the time of the attachment levy of appellant Riordan Mercantile Company, there would have been a surplus of ewes, rams, and lambs, and a shortage of wethers. Recourse to substitution is therefore unavailing, and the evidence shows that no substitution was ever made.

The Court also erred for the reason that the evidence shows conclusively that at least four thousand head of the sheep included in the attachment levy and sale of Riordan Mercantile Company were not included in the mortgages of said appellees, or either of them. (Rec., p. 105.) The Court could not therefore decree that the property attached by appellant Riordan Mercantile Company was the same as conveyed by mortgages of appellees and that its rights were subject to those of appellees. The evidence also shows that from the description of the property in said mortgages of appellees it was impossible to distinguish or identify the property attempted to be conveyed thereby, and there is no evidence that any one knew what property was attempted to be conveyed thereby, save from the mortgages themselves. The Court could not therefore adjudge that appellants Arizona Lumber and Timber Company and Riordan Mercantile Company had actual notice of what said property was. The evidence shows that defendant Fulton was not indebted to appellant Riordan Mercantile Company at the time of the pretended agreement between appellees and appellant Arizona Lumber and Timber Company, that said Riordan Mercantile Company was not a party or privy to said agreement, that said wool release was made to Arizona Lumber and Timber Company, and fails to show that Riordan Mercantile Company received any consideration of any kind, at any time, from said appellees, or from any one else, for any such agreement. (Rec., p. 105.) The Court could not, therefore, adjudge that appellant Riordan Mercantile Company was bound by said pretended agreement.

We therefore submit to the Court that the attachment lien of Riordan Mercantile Company and the mortgage owned by Northwestern National Bank are prior and subsisting liens to the alleged mortgages of appellees, and that the decree and judgment of the trial Court should not stand.

Before concluding, we ask the particular attention of the Court to the following cases, decided subsequent to the decree in this action, in which the points at issue are very similar to those raised in this cause:

*Avery v. Popper*, 34 S. W. (Tex.) 325.

*McDonald v. Tower Lumber and Mfg. Co.*, 38 Pac. 1122.

#### POINT VIII.

The liens of the appellants specifically cover *all* of the sheep in controversy (Rec. 218 and 219) and are prior and subsisting liens to the mortgages of appellees. The judgment of the Supreme Court of Arizona affirming the judgment of the trial Court should be reversed and the liens of the appellants, in the order of their legal standing, should be given priority on all said sheep over the alleged claims of said appellees.

Respectfully submitted.

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